evidence as a whole at some length and said that such evidence as there was, particularly, having particular regard to the medical evidence, did not make out the defence of insanity. That expression of opinion may or may not have carried weight with the jury. It is, however, well-settled that unless he expresses himself in extreme and dogmatic terms, which was not done in this case, a Judge is entitled if he thinks such a course necessary for the guidance of a jury to express his own personal views regarding the evidence so long as he makes it clear that it is his own view which he is expressing and that the jury are not bound to accept it.

The appeal is dismissed.

Appeal dismissed.

Solicitors: *Jayadeva & Zahir.*

HASSAN v. PUBLIC PROSECUTOR

[A. Cr. J. (Syed Sheh Barakbah J.) June 4, 1962]

[Alor Star — Kedah Criminal Appeal No. 104 of 1961]

Criminal Law and Procedure — Recall of prosecution witness by accused — Criminal Procedure Code (Cap. 6), s.173(j) — Burden of proof — Misdirection.

The accused was charged and convicted by the President of the Sessions Court for an offence punishable under section 3(c) of the Prevention of Corruption Ordinance. On appeal it was argued for the appellant that: (1) the learned President was wrong in law in refusing the application of the defence counsel to recall certain prosecution witnesses during the course of the trial, (2) the learned President misdirected himself on the question of the burden of proof.

Held: (1) the defence should be accorded the right to recall the prosecution witnesses unless the application was frivolous or vexatious; otherwise it would occasion a failure of justice. *Ong Boon Siang & Ors.* v. *R.* (1) followed;

(2) the learned President misdirected himself on the burden of proof. It is for the prosecution to prove their case beyond reasonable doubt and not for the accused to prove his innocence.

Case referred to:—

(1) *Ong Boon Siang & Ors.* v. *R.* [1961] M.L.J. 4.

CRIMINAL APPEAL.

D. R. Seenivasagam for the appellant.

Abdul Kadir bin Yusoff (Deputy Public Prosecutor) for the respondent.

Syed Sheh Barakbah J.: This is an appeal by the appellant against the conviction and sentence of 4 months' imprisonment passed on him by the learned President of the Sessions Court, Sungei Patani.

The charge is as follows:—

"That you between 28.4.60 and 22.5.60, at the Forest Checking Station, Sik, in the District of Gurun, in the State of Kedah, being an agent, namely a Forester, employed by the Government of the Federation of Malaya, in the Forest Department, Kedah, did knowingly use with intent to deceive your principal, certain documents to wit, 6 Timber Removal Passes in respect of which, the principal is interested and which contain statements that they were issued in respect of timber removed by one Tham Chew Chee Cheang which statement is false in material particular and which statement to your knowledge was intended to mislead your principal and that you have thereby committed an offence punishable under section 3(c) of the Prevention of Corruption Ordinance, 1950."

The facts of the case have been fully set out by the learned President in his grounds of judgment and I therefore need not go through them in detail. The brief facts are as follows:

PW1 had no licence to fell timber in April and May 1960. In that period he took timber out through the Forest Checking Station where appellant worked as officer-in-charge. Dues were paid to the appellant for the timber taken out. PW1 used two lorries to transport the timber driven by PW3 and PW4. The appellant issued removal passes to these drivers not in the name of PW1 but in the names of other licensees including Tan Sue Chee Chong (PW8). PW8 had given permission to PW9 to renew his licence under his name. Neither PW8 nor PW9 gave permission to the appellant or anyone else to use PW8's name for timber removal by PW1. Two other licensees, PW12 and PW13 were also mentioned in the removal passes issued by the appellant to PW3 and PW4. They also did not give permission to use other names on the passes. The removal passes were signed by the appellant.

On August 20, 1960, PW1 made a report to the police stating that the appellant had demanded $240 as coffee money, failing which he would not be allowed to take out timber. Subsequently he gave $240 marked notes given to him by the police to the appellant. The appellant took only $100 asking PW1 to keep the balance as he was hard up and the timber had not been brought out yet. The police then arrested the appellant and found marked notes on his person. The appellant made a cautioned statement to the police stating that the money was in payment of a loan made by him to PW1.

There were five grounds of appeal. During the course of the hearing the learned counsel for the defence abandoned grounds (a), (b) and (c) leaving only grounds (d) and (e), namely —

(d) "The learned President was wrong in law in refusing the application of defence counsel to recall certain prosecution witnesses during the course of the trial. The right to recall is absolute and the failure of the learned President to allow this is fatal to the trial and the conviction and sentence therefore cannot stand."

(e) The learned President has misdirected himself on the question of burden of proof in criminal cases and has in fact required the defence to prove their innocence."

I shall deal with ground (e) first. In his judgment at page 36, para. B, last two lines, the President states —

"Obviously, accused is abetting the illegal transaction of PW1, and there being no corroboration of his evidence it must be accepted with suspect."

From this it would appear that the learned President was placing the burden on the appellant. In my opinion the learned President has misdirected himself as in all criminal cases it is for the prosecution to prove their case beyond reasonable doubt because there is a presumption in law that every man is innocent and that if he

is to be proved guilty the burden is on the prosecution. It is not for the accused to prove his innocence.

With regard to ground (d), counsel for the defence quoted section 173(j) of the Criminal Procedure Code which runs as follows:—

"If the accused does not plead guilty to the charge as amended or if no amendment is made the accused shall then be called upon to enter upon his defence and to produce his evidence and shall at any time while he is making his defence be allowed to recall and cross-examine any witness present in the Court or its precincts."

According to the learned counsel this section gives absolute and unqualified right to the defendant to recall witnesses. At page 28 para. C of the record the learned President disallowed his application to recall PW1 and gave no reason for the rejection.

Rose C.J. in the case of *Ong Boon Siang & Ors.* v. *Regina* [1] in his judgment stated —

"In the present case it cannot, in my view, be seriously disputed that the appellants were still making their defence at the time of their application. The application, therefore, should have been treated on its merits. Presumably in some cases a judge would be entitled to take the view that the application was frivolous or vexatious and might therefore properly be refused. The learned District Judge did not purport to disallow the application on the ground that it was frivolous or vexatious, but on the ground that it was out of time."

The learned Deputy Public Prosecutor in reply referred to *Mallal's* Criminal Procedure, 4th edition, page 592, under the heading of "Irregularity and Illegality" which says —

"The object of procedure is to enable the Court to do justice, but if, in spite of even a total disregard of the rules of procedure, justice has been done, there would exist no necessity for setting aside the final order which is just and correct simply because the procedure was wrong."

He submitted that this Court should consider the merits of the case and the evidence as a whole.

In my view, with respect, I agree with the judgment of Rose C.J. that unless the application was frivolous it should not be refused. In that case the reason for refusal was on the ground that it was out of time, but in the present case no reason at all was given. In my opinion the defence should be accorded the right to recall PW1 unless the application was frivolous or vexatious, otherwise it would occasion a failure of justice.

In the circumstances I consider this is a fit case for retrial. I therefore set aside the conviction and sentence of the Court below and send the case back for rehearing before another President of the Sessions Court.

Retrial ordered.

Solicitors: *S. Seenivasagam & Sons.*

THE COASTAL BUS CO. LTD. v. PUBLIC PROSECUTOR

[A. Cr. J. (Ismail Khan J.) June 9, 1962]

[Muar — Criminal Appeal No. 49 of 1961]

Road Traffic — Permit or licence — Failure of prosecution to produce permit — Charge not proved — Road Traffic Ordinance, 1958, ss.121 and 152.

Criminal Law and Procedure — Company with limited liability — Sentence — Imprisonment in lieu of payment of fine.

The appellant company and a driver employed by the appellant were charged under section 120(2), Road Traffic Ordinance, 1958, for failing to comply with the condition set out in a permit relating to the number of passengers to be carried and the learned Magistrate convicted the company to pay a fine of $500 and "or in default on failure of levy to imprisonment of four months" and the second appellant (the driver) to a fine of $50 or in default thereof, to 3 weeks' imprisonment. Both the appellants appealed. It was argued for the appellants that the learned Magistrate failed to direct himself to the fact that the prosecution had failed to produce Permit No. 2035, and had therefore failed to prove a breach of the condition of the permit.

Held: (1) having regard to reg. 3(4) of the Motor Vehicles Commercial Use Regulations the permit or licence contemplated by sections 121 and 152 respectively of the Road Traffic Ordinance must refer to the comprehensive permit. As the prosecution did not produce this comprehensive permit the contravention whereof which formed the subject of the charge could not be said to have been proved;

(2) the sentence of imprisonment in default of payment of fine on the 1st appellant was clearly wrong as the 1st appellant was a limited liability company.

[**Editorial Note:** The learned Judge did not comment on the charges against the appellants. It would appear that both the company and the driver are referred to as owners in the charge.]

CRIMINAL APPEAL.

F. Keith Sellar for the appellants.

Tengku Rithauddin (Deputy Public Prosecutor) for the respondent.

Ismail Khan J.: The 1st appellant is a limited company and is the owner of motor bus No. JA. 6402, and the 2nd appellant is the driver thereof employed by the 1st appellant. The charge against the 1st appellant and the amended charge against the 2nd appellant were respectively as follows:—

"That you on the 10th day of January, 1961 at about 11.20 a.m. at Jalan Pantai, in the District of Batu Pahat, in the State of Johore, being the registered owner of M/Bus No. JA. 6402, did permit the said vehicle in contravention of a condition attached to P.S.V. Permit No. 2035 issued under sections 118 and 119 of the Road Traffic Ordinance, 49/58, to wit, did carry 22 passengers an excess of 6 passengers and that you have thereby committed an offence punishable under section 120(2) of the Road Traffic Ordinance, 49/58.